2010

Cyndi French v. Labor Commission, Federal Deposit Insurance Corp., Advanta Bank Corp., Pacific Employers Insurance Company : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CYNDI FRENCH, Petitioner/Appellant, v. LABOR COMMISSION, FEDERAL DEPOSIT INSURANCE CORP. as receiver for ADVANTA BANK CORP., and PACIFIC EMPLOYERS INSURANCE COMPANY, Respondents/Appellees.	**Case No. 20100456**

BRIEF OF APPELLEE FEDERAL DEPOSIT INSURANCE COMPANY AND PACIFIC EMPLOYERS INSURANCE COMPANY

PETITION FOR REVIEW FROM ORDERS OF THE LABOR COMMISSION OF UTAH

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JURISDICTIONAL STATEMENT

Appellant has not provided a jurisdictional statement in her brief. Appellees contend that the Utah Court of Appeals does not have jurisdiction over this matter and intends to file a motion for summary disposition in support of that contention in the near future.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The disjointed nature of Appellant's brief, and the Appellant's failure to provide her own statement of issues, have made it difficult to identify specific issues that have been raised on appeal. As such, the following broad statement of issues is offered by the Appellees:

Whether the Administrative Law Judge and Labor Commission abused their discretion by denying Appellant's claim for workers' compensation benefits.

Standard of Review:

This issue involves the Labor Commission's factual determinations. The agency's determinations should be upheld so long as they are supported by substantial evidence. Brown & Root Indus. Service v. Industrial Com'n of Utah, 947 P.2d 671, 677 (Utah 1997).

This issue also involves the Labor Commission's application of facts to law. The Legislature has granted the Commission discretion to determine the facts and apply the law to the facts. Ae Clevite, Inc. v. Labor Com'n, 2000 UT App 35 ¶ 7, 996 P.2d 1072. As such, the Commission's application of the law to the facts of this case should be upheld unless the application exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion. Id.

STATEMENT OF CASE

Appellees Federal Deposit Insurance Corporation ("FDIC"), as receiver for Advanta Bank, and Pacific Employers Insurance Company ("Appellees" collectively), respectfully request that the Court uphold the decisions of the Administrative Law Judge ("ALJ") and the Utah Labor Commission denying Appellant Cyndi French's application for workers' compensation benefits.

Appellant began her employment with Advanta Bank in 1998. (R. Vol. 3 at 11:4-6.) She held a number of different positions with Advanta until she was laid off as part of a large scale workforce reduction in 2009. (R. Vol. 3 at 14:16-16:5.) In 2000, Appellant began to experience pain in her arms, which she attributes to the typing that was required as part of her position as a customer service agent for Advanta. (R. Vol. 3 at 11:4-12:1; 14:3-9.) Appellant was eventually diagnosed with "overuse syndrome" by Dr. Chung. (R. Vol. 2 at 2.) Advanta moved Appellant to a number of different positions which required significantly less typing. (R. Vol. 3 at 14:16-15:25.) The reduced typing did not alleviate the overuse syndrome, and the Appellant alleges that the symptoms not only continued, but spread to other parts of her body. Appellant alleges that she eventually experienced overuse syndrome in her wrists, forearms, triceps, left piriformis muscle, lower back, temporomandibular joint, and both shins. (R. Vol. 3 at 17:4-25.)

Appellees initially accepted the Appellant's workers' compensation claim and paid medical benefits related to her treatment, including her visits with Dr. Chung. (R. Vol. 1 at 20; R. Vol. 2 at 2-173.) On November 24, 2008, at the request of Appellees, Appellant underwent an independent medical examination ("IME") with Dr. Richard Knoebel. (R.

Vol. 1 at 23-35.) At the conclusion of her examination, Appellee indicated that she was satisfied with the manner in which Dr. Knoebel had performed his evaluation and stated that "Everything about my overuse syndrome was addressed." (R. Vol. 2 at 213.")

Dr. Knoebel determined that Appellant was suffering from nonspecific diffuse pain complaints without significant objective findings. (R. Vol. 1 at 23.) He also determined that Appellant's complaints were non-industrial in origin. (R. Vol. 1 at 23.) As a result of Dr. Knoebel's opinions, Appellees denied Appellant's requests for further workers' compensation benefits.

PROCEEDINGS BELOW

Appellant filed an Application for Hearing with the Labor Commission on January 12, 2009, alleging that her employment with Advanta had caused overuse syndrome in her upper extremities and the left side of her buttocks. (R. Vol. 1 at 1.) She requested recommended medical care benefits, including prescriptions, a tens unit, physical therapy, and massage therapy. (R. Vol. 1 at 3.) In support of her claim, Appellant included a Summary of Medical Record form filled out by Dr. Chung, which indicated that Appellant had been experiencing chronic non-specific soft tissue pain in her upper extremities and which recommended long term access to prescription narcotics. (R. Vol. 1 at 6.) Appellees filed an answer denying that Appellant's alleged injuries were caused by her employment with Advanta, and attached Dr. Knoebel's IME report in support of their denial. (R. Vol. 1 at 18-35.)

Appellees prepared a medical records exhibit ("MRE"), for the evidentiary hearing on June 16, 2009 (R. Vol. 2.) Appellant was provided with a copy of the MRE prior to the

evidentiary hearing. (R. Vol. 3 at 5:12-24.) The MRE included medical records from a number of Appellant's medical care providers, including Dr. Chung, as well as the IME report from Dr. Knoebel. (R. Vol. 3 at 2 and 210.) Appellee did not object to the contents of the MRE at any time prior to or during the evidentiary hearing. At the hearing, Appellant indicated that she was suffering from overuse syndrome, caused by her employment at Advanta, in her wrists, forearms, triceps, left piriformis muscle, lower back, temporomandibular joint, and both shins. (R. Vol. 3 at 17:4-25.)

On August 24, 2009, ALJ Richard M. La Jeunesse issued his Findings of Fact, Conclusions of Law and Interim Order. The ALJ found that there was "no medical expert opinion that supports a casual medical relationship between Ms. French's employment activities at Advanta and her temporomandibular joint, low back, bilateral buttocks, or lower extremity pain." (R. Vol. 1 at 43.) As a result, the ALJ dismissed Appellant's claims regarding those areas of her body with prejudice. (R. Vol. 1 at 43.) He noted that there were conflicting medical opinions regarding the cause and nature of Appellant's upper extremity complaints between doctors Chung, Hammon, and Knoebel, and thus referred the Appellant's case to an independent medical panel for consideration. (R. Vol. 1 at 42.)

Appellant's medical records were delivered to the Medical Panel on September 16, 2009, and reviewed. (R. Vol. 1 at 54.) The Panel examined Appellant on October 6, 2009. (R. Vol. 1 at 54.) It determined that Appellant's upper extremity complaints were not caused by her employment with Advanta. (R. Vol. 1 at 54.)

The Panel's findings were circulated by the ALJ on October 26, 2009, along with a notice that the parties had twenty days to object to the Panel report. (R. Vol. 1 at 53.)

Appellant filed an objection to the Medical Panel report on November 3, 2009. (R. Vol. 1 at 69.) The Appellant's objection did not state any allegations regarding mistakes in the report or improper medical procedures on the part of the Medical Panel. (R. Vol. 1 at 69-70.) The objection did not mention the Medical Panel's examination or its findings at all, but merely gave a brief history of Appellant's employment with Advanta and her alleged symptoms. (R. Vol. 1 at 69-70).

The ALJ issued his final order on November 16, 2009. (R. Vol. 1 at 76.) The ALJ denied Appellant's objection to the Medical Panel report because the objection consisted of restating Appellant's employment activities at Advanta together with her symptoms, which "added nothing" to the case that was not already considered in the ALJ's Interim Order and by the Medical Panel. (R. Vol. 1 at 77.) The ALJ found the Medical Panel Report to be "thorough, well considered, and carefully analyzed" and admitted the report into evidence. (R. Vol. 1 at 77, 81.) The ALJ then found that the preponderance of the evidence indicated that the Appellant's employment at Advanta did not cause her upper extremity problems and dismissed her claim with prejudice. (R. Vol. 1 at 81, 83-84.)

Appellant filed a one page Motion for Review on December 15, 2009. (R. Vol. 1 at 86.) Her motion did not allege that any errors had been made by the Medical Panel, did not allege any problems with the MRE, and did not allege any errors of fact or law had been made by the ALJ. (R. Vol. 1 at 86.) The motion merely restated Appellant's claims and indicated that her alleged injury continued to cause her pain. (R. Vol. 1 at 86.) On December 31, 2009, Appellees filed a memorandum in opposition to Appellant's motion for review. (R Vol. 1 at 87-88.)

On February 23, 2010, the Labor Commission issued an order denying Appellant's motion for review and reaffirming the ALJ's decision. (R. Vol. 1 at 92-94.) The Labor Commission determined that the Medical Panel's opinion in this case was persuasive because the Panel is impartial and had the benefit of reviewing the Appellant's medical records as well as those submitted by Appellees. (R. Vol. 1 at 93.) The Labor Commission accepted the Medical Panel report, held that the Appellant's employment did not cause or aggravate her condition, and concurred with the ALJ's determination that the Appellant was not entitled to workers' compensation benefits. (R. Vol. 1 at 93.)

On March 15, 2010, Appellant filed a Motion for Reconsideration with the Labor Commission. (R. Vol. 1 at 101.) She argued that she disagreed with Dr. Knoebel and the Medical Panel's conclusions regarding the cause of her symptoms because she had never suffered from pain and numbness in her upper extremities before she worked for Advanta, and thus her condition must have been caused by her employment with Advanta. (R. Vol. 1 at 101.) Appellant also attached a number of documents to her motion which addressed the causes of overuse syndrome. (R. Vol. 1 at 101-111.) Appellees filed a memorandum opposing reconsideration on March 31, 2010. (R. Vol. 1 at 114.) The Labor Commission denied the Appellant's Motion for Reconsideration on April 27, 2010. (R. Vol. 1 at 118.) The Commission noted that the Appellant argued that Dr. Knoebel's opinion should not be given any weight in deciding her claim. (R. Vol. 1 at 119.) In response, the Commission clarified that, "it is the [Medical] Panel's report that the Commission has found to be persuasive, not the individual opinions of Advanta's medical expert or Ms. French's treating physicians." (R. Vol. 1 at 119.) Appellant then filed the present appeal.

SUMMARY OF ARGUMENT

This Court should find that the ALJ and Labor Commission did not abuse their discretion by denying Appellant's claim for workers' compensation benefits.

The Court need not address the substance of Appellant's argument and should dismiss her appeal for being inadequately briefed. The Appellant's brief is a mishmash of vague arguments with no basis in law or fact. It fails to identify any specific issues on appeal, contains no citations to the record, and cites almost no legal support for the Appellant's claims. The Appellant has failed to cite any appropriate grounds for appellate review, and as such the appeal should be dismissed.

Additionally, the arguments made in Appellant's brief were never raised in the proceedings below. As such, the Appellant has not preserved those arguments and has waived them on appeal.

Further, the errors alleged by Appellant are either the result of the Appellant's misunderstanding of Utah workers' compensation law, or merely the Appellant's unsubstantiated feelings that the Labor Commission decided the case incorrectly. In actuality, the ALJ and the Labor Commission acted appropriately in every instance during the litigation of the Appellant's claim. Their findings of fact were supported by substantial evidence and their decisions were well within the bounds of reasonableness and rationality.

Finally, most of the errors alleged by the Appellant do not rise to the level of reversible error. An error only rises to the level of reversible error if it affects a substantial right of a party. Here, the Appellant's claims were dismissed because she failed to produce medical evidence supporting her claims and because the Medical Panel determined that

Appellant's alleged condition was not the result of her employment with Advanta. The Labor Commission expressly stated that it was the Medical Panel's opinion, not any other medical opinion, that was persuasive in denying Appellant's claims. Thus, any errors that the Appellant alleges that do not involve the Labor Commission's adoption of the Medical Panel's opinion did not affect her substantial rights and thus do not rise to the level of reversible error.

DETERMINATIVE STATUTES AND RULES

The determinative statutes and rules may be found in their entirety in the Addendum. Their citations are: Utah Code Ann. § 34A-2-601, Utah Administrative Code R602-2-1(F)(3), Utah Administrative Code R602-2-2, and Utah Rule of Appellate Procedure 24.

ARGUMENT

This Court should find that the Labor Commission did not abuse its discretion by denying Appellant French's request for workers' compensation benefits. This brief represents the Appellee's good faith effort to distill Appellant's brief into cognizable legal and factual arguments that are appropriate for review by the Court. However, identifying Appellant's specific issues on appeal is difficult because Appellant has utterly failed to provide an appropriate statement of issues or related standards of appellate review as required by Rule 24(a)(5) of the Utah Rules of Appellate Procedure. As such, Appellant's appeal should be dismissed pursuant to Rule 24(k) for failing to meet the minimum standards mandated by the Rules of Appellate Procedure.

Furthermore, the Appellant's brief fails to state a cognizable legal argument as to why the Labor Commission's denial of Appellant's claim should be overturned. The few citations to legal authority included in the brief are either irrelevant or have been misunderstood by the Appellant. Where a brief's overall analysis is so lacking that it shifts the burden of research and argument to the Court, the Court need not even consider it. Smith v. Smith, 1999 UT App 370, ¶ 8, 995 P.2d 14. While the Appellees appreciate the difficulties faced by a pro se appellant, the Appellant's brief in this case is devoid of almost any relevant legal analysis. Her arguments are largely bald assertions that lack a foundation in law or fact which are structured in such a way that the reader is forced to guess at identifying the legal challenges that are being made. It is not the Court's or the Appellees' responsibility to construct a valid legal argument for the Appellant. As such, the Court need

not even consider the merits of the Appellant's brief, and should deny her appeal as inadequately briefed. Id.

Additionally, Appellant has failed to marshal the evidence as required to challenge a finding of fact. A party challenging findings of fact has the burden of establishing that those findings are not supported by the evidence. Cambelt Int' Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987). To successfully challenge findings of fact on appeal, an appellant must identify all of the evidence supporting the findings and then show that the evidence is inadequate to sustain the findings, even when viewed in the light most favorable to the court below. Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998). "If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court." Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991). In this case, Appellant has not attempted to marshal the evidence. Therefore, to the extent Appellant challenges the Labor Commission's factual findings, such challenges must be rejected, and this Court should hold that the record supports the findings of the Labor Commission below.

I. APPELLANT HAS NO BASIS FOR OBJECTION TO DR. KNOEBEL'S INDEPENDENT MEDICAL EXAMINATION.

In her Argument I, Appellant argues that Appellees' medical expert, Dr. Knoebel, performed an invalid medical examination. However, Appellant has waived any objections to Dr. Knoebel's IME by not raising this issue below. Additionally, Appellant has not cited any fact or law which indicates that Dr. Knoebel's IME is invalid. Moreover, the Labor Commissions' decision to deny Appellant's workers' compensation claim was based on the

Medical Panel report, not Dr. Knoebel's IME. Thus, any error related to Dr. Knoebel's IME does not rise to the level of reversible error.

A. Appellant has Waived Any Objections to Dr. Knoebel's IME.

Appellant did not raise any objections to Dr. Knoebel's IME or his report during the proceedings below and has therefore waived her right to raise such objections on appeal. "To preserve an issue for appeal, the appellant must have raised a timely and specific objection before the trial court." H.U.F. v. W.P.W., 2009 UT 10, ¶ 25, 203 P.3d 943 (internal quotation omitted). The Court of Appeals will not address an issue if it has not been preserved. Id.

Appellant's objection to Dr. Knoebel's IME appears to be that Dr. Knoebel did not employ an x-ray or MRI during the examination. As the subject of Dr. Knoebel's examination, Appellant was aware, as of the date of her examination, that no imaging tests were employed. Additionally, Appellant became aware of Dr. Knoebel's IME report, at the very latest, when Appellee filed its Answer, which included an attached copy of Dr. Knoebel's report. (R. Vol. 1 at 18-35.) Dr. Knoebel's report contains a detailed account of his examination of the Appellant, including the tests that were employed, as well as the opinions he generated as a result of the examination. (R. Vol. 2 at 214-226.) Additionally, the MRE also contained a copy of Dr. Knoebel's report. (R. Vol. 2 at 214-226.)

Despite being aware that neither MRI nor x-ray imaging had been employed by Dr. Knoebel, Appellant never submitted an objection to Dr. Knoebel's IME at any time prior to the evidentiary hearing. At the evidentiary hearing, Appellant indicated that she

had received a copy of the MRE prior to the hearing and that she had reviewed it for "completeness and accuracy." (R. Vol. 3 at 5:12-24.) She did not object to Dr. Knoebel's IME and stipulated that the MRE contained all of the relevant medical records. (R. Vol. 3 at 5:12-24.) Appellant has not objected to the tests performed by Dr. Knoebel, or his failure to administer an x-ray or MRI, at any time prior to the filing of her appeal. In fact, at the time of her IME, Appellant indicated that she was pleased with the manner in which Kr. Knoebel performed his evaluation and stated that he had addressed "everything" about Appellant's overuse syndrome complaints. (R. Vol. 2 at 213.)

The Appellant has never objected to Dr. Knoebel's IME prior to filing her appellate brief. As such, she failed to preserve the matter for appeal and her right to raise the matter on appeal has been waived. H.U.F. v. W.P.W., 2009 UT 10, ¶ 25.

B. Appellant's Objection to Dr. Knoebel's Independent Medical Evaluation is Without Basis in Fact or Law.

Appellant has not raised any factual or legal arguments that Dr. Knoebel's IME was somehow invalid. She does not cite to any evidence in the record, or submit any new evidence, in support of her allegation that Dr. Knoebel's IME was medically deficient, nor does she cite any law in support of her contention.

It appears Appellant simply misunderstands the role of an IME in the Utah workers' compensation scheme. An employer or its insurer is entitled to an IME as part of its investigation of a workers' compensation claim. Utah Admin. Code R602-2-1(F)(3). It is the claimant's duty to provide her own supporting medical evidence for inclusion in the MRE. Utah Admin. Code R602-2-1(H)(1) and (2). Neither the

claimant's medical records nor the employer's IME are binding on the Labor Commission. The law provides for disputes between doctors to be resolved through the use of an independent medical panel. UCA § 34A-2-601; Utah Admin. Code R602-2-2. When the scheme is properly understood, it becomes apparent that if the claimant disagrees with the employer's IME, her recourse is to provide her own medical evidence which supports her claim. Here, Appellant did just that, but the Medical Panel simply disagreed with her medical evidence.

C. Even if Dr. Knoebel's Independent Medical Evaluation Was Somehow Invalid, Any Error Related to the Evaluation is Not Reversible.

Even if Appellant could somehow establish that Dr. Knoebel's evaluation was invalid, she cannot establish that its use in the proceedings below rose to the level of reversible error. An error that does not affect the substantial rights of the parties is not reversible error. Utah R. Civ. P. 61; State v. Dominguez, 2009 UT App 73 ¶ 12, 206 P.3d 640. Thus, the Appellant must show not only that there was error, but that she was deprived of a full and fair consideration of her case as a result. Redevelopment Agency of Salt Lake City v. Mitsui Inv. Inc., 522 P.2d 1370, 1374 (Utah 1974).

Here, all of Appellant's medical claims, other than those related to her upper extremities, were dismissed because she failed to submit medical evidence supporting them. (R. Vol. 1 at 45.) Thus, the dismissal of these claims had nothing to do with Dr. Knoebel's report, but resulted from Appellant's failure to submit the necessary supporting medical documents.

The Appellant's remaining claim regarding her upper extremities was submitted to an independent Medical Panel for review because of the existence of conflicting medical opinions. (R. Vol. 1 at 51-52.) The Medical Panel reviewed all of the relevant medical records, including Dr. Chung's records and Dr. Knoebel's report, and determined that the Appellant's upper extremity complaints were not caused by her employment with Advanta Bank. (R. Vol. 1 at 54.) The ALJ relied primarily on the Medical Panel's report, which he held was "thorough, well considered, and carefully analyzed," in denying Appellant's upper extremity claims. (R. Vol. 1 at 81.) The Labor Commission specifically indicated that it was the Panel's report that the Commission found persuasive, not Dr. Knoebel's report, when denying Appellant's claims. (R. Vol. 1 at 119.)

Thus, it was Appellant's failure to submit evidence supporting most of her claims, and the Medical Panel's determination that her upper extremity complaints were not caused by her employment, that resulted in the dismissal of her case. Dr. Knoebel's report was not the cause of the dismissal of Appellant's claim, and as such, any error related to his report does not rise to the level of reversible error.

II. THE LABOR COMMISSION APPROPRIATELY ADOPTED AND RELIED UPON THE MEDICAL PANEL REPORT.

The Appellant's second argument appears to be that the Labor Commission should not have adopted the Medical Panel report because of errors in the Medical Panel's methodology. However, the Appellant has waived her right to object to the Medical

Panel report and has failed to establish that there are any significant defects in the report which would preclude adoption by the Labor Commission.

A. The Appellant Has Waived Her Right to Object to the Medical Panel Report.

As noted *supra*, the Appellant must have preserved her right to raise arguments in her appeal by raising those arguments in the proceedings below. Here, Appellant argues that the Medical Panel report was defective because it was not supported by objective medical findings and because the Medical Panel did not employ x-rays, MRI's or similar imaging devices when examining her. However, the Appellant did not assert these arguments below and therefore did not preserve them for appellate review.

The Medical Panel report in this case was circulated by the ALJ on October 26, 2009. (R. Vol. 1 at 53.) The ALJ included a notice which indicated that the parties had 20 days to object to the report. (R. Vol. 1 at 53.) Appellant filed a pleading that purported to be an objection to the Medical Panel report on November 1, 2009. (R. Vol. 1 at 69-70.) However, Appellant's "objection" did not actually address any perceived errors in the Medical Panel's methodology or reasoning. (R. Vol. 1 at 69-70.) Specifically, the objection did not indicate that the Report was not supported by objective medical evidence, nor did it contend that the Medical Panel's failure to use imaging devices during Appellant's examination invalidated the report. Rather, the objection merely gave a history of the Appellant's employment with Advanta and restated her alleged injuries. (R. Vol. 1 at 69-70.)

The ALJ rejected the Appellant's objection to the Medical Panel report, explaining that "Ms. French's objections to the Medical Panel report consisted of restating her employment activities at Advanta together with her symptoms already considered at length in my Interim Order." (R. Vol. 1 at 77.)

The Appellant has never objected to the Medical Panel's methodology or alleged that the Medical Panel report was not supported by objective medical findings until she filed her appeal. As such, the Appellant failed to preserve these subjects during the proceedings below and has therefore waived her right to raise such arguments on appeal.

B. The Labor Commission's Adoption of the Medical Panel Report Was Appropriate.

The Appellant's current objections to the Medical Panel Report seem to be based on a misunderstanding of the term "objective medical finding" and a misreading of UCA § 34A-2-601. Appellant argues, without citation to any authority, that the Medical Panel report must be supported by objective medical findings, which she defines as diagnostic tools or standardized laboratory tests. However, assuming the Appellant is accurate in her unsupported assertion regarding necessary objective medical findings, her definition of such findings is unsupported and unreasonably narrow. The Medical Panel Report is replete with objective medical findings, including the results of the Panel's examination of the Appellant and its review of her medical records. (R. Vol. 1 at 56-68.) Further, the Panel reports the results of the tests it performed on the Appellant, and notes that the medical records regarding the Appellant were sufficiently comprehensive that additional lab data was not necessary. (R. Vol. 1 at 58.) Thus, the Medical Panel's report was

supported by objective medical findings, test results, and a review of the Appellant's prior test results.

The Appellant also argues that UCA § 34A-2-601 mandated that the Medical Panel should have employed an x-ray, MRI, or JTech device in its examination of the Appellant. (Appellant's Brief at 10.) However, Appellant's argument is based on a misreading of UCA § 34A-2-601, which clearly states that the Medical Panel "*may*" employ studies, x-rays, or tests "to the extent the medical panel...determines that it is necessary or desirable" during its examination of a workers' compensation claimant. The plain language of UCA § 34A-2-601 does not mandate the use of studies, x-rays, or tests, but merely indicates that such are permissible, if deemed necessary by the Panel.

The Appellant has failed to raise any defects with the Medical Panel report in support of her argument that it should not have been adopted by the Labor Commission. As such, the ALJ was correct in finding that the report was "thorough, well considered, and carefully analyzed" and he acted appropriately in adopting its findings. (R. Vol. 1 at 81.)

III. THE ALJ ACTED APPROPRIATELY IN THE FACE OF CONFLICTING MEDICAL EVIDENCE BY SUBMITTING THE CASE TO A MEDICAL PANEL.

Appellees do not entirely understand the argument made by Appellant in the Argument III section of her brief. However, the argument does not appear to have been raised in the proceedings below and, as discussed *supra*, has therefore been waived.

It appears that the substance of Appellant's Argument III is simply that there is medical evidence in the record which supports her claims. By listing her various medical

care providers, the Appellant appears to be trying to establish that she submitted medical evidence indicating that she suffers from injuries caused by an industrial disease. Certainly, there is no question that Appellant submitted medical evidence in support of her claims. However, the mere fact that the Appellant submitted supportive medical evidence is not sufficient to be successful in her case, or to justify a reversal of the Labor Commission's decision.

Appellees submitted medical evidence from Dr. Knoebel that conflicted with the Appellant's medical evidence. (R. Vol. 2 at 215-227.) The ALJ clearly acknowledge such in his Order. (R. Vol. 1 at 81.) In fact, it was the conflicting medical opinions between Dr. Chung, Dr. Hammond, and Dr. Knoebel which prompted the ALJ to submit the matter to a Medical Panel. (R. Vol. 1 at 81.)

Utah Administrative Rule R602-2-2(A) mandates that a Medical Panel be utilized when there are conflicting medical opinions involving the cause of an injury or disease in a workers' compensation claim. Thus, when faced with conflicting opinions regarding causation between Dr. Chung, Dr. Hammond, and Dr. Knoebel, the ALJ in this case acted appropriately by submitting the case to a Medical Panel. (R. Vol. 1 at 51.) Thus, the mere fact that the Appellant submitted medical evidence in support of her claims is not sufficient to prevail, nor is it reason to reverse the ALJ's findings of fact and conclusions of law or the Labor Commission's affirmation of those findings and conclusions.

IV. APPELLANT'S ARGUMENT IV MERELY STATES THAT APPELLANT DISAGREES WITH THE LABOR COMMISSION'S DISMISSAL OF HER CLAIM, WHICH IS NOT AN APPROPRIATE BASIS FOR APPELLATE REVIEW.

Argument IV of Appellant's brief does not appear to be a legal argument at all. It contains no citations to law or fact and does not identify a specific point of error on the part of the Labor Commission which the Appellant believes justifies reversal of the dismissal of her claim. However, Appellant's Argument IV is representative of the substance of most of her brief, in that she seeks appellate review not because of any specific errors of law or fact on the part of the Labor Commission, but simply because she disagrees with the Labor Commission's decision.

Merely disagreeing with the Labor Commission's decision is simply not a sufficient basis for an appeal. As noted above, Appellant has failed to include a statement of facts supported by the record, identify the issues on appeal, identify the standards of review, support her contentions with citations to the record, or support her arguments with relevant legal analysis. In general, she has failed to comply with the requirements of Rule 24. Utah R. App. P. 24(a). As such, her appeal should be dismissed for inadequate briefing. State v. Price, 827 P.2d 247, 249 (Utah App 1992).

V. APPELLANT HAS NO BASIS FOR HER ARGUMENT THAT PRIOR PAYMENT OF WORKERS' COMPENSATION BENEFITS INDICATES THAT SUCH PAYMENTS SHOULD NOT BE DENIED.

Appellant's Argument V states, without citation to law or fact, that her claim for workers' compensation benefits should have been granted because her employer provided workers' compensation benefits prior to denying them. Once again, Appellant has not

raised this matter in the proceedings below and, as explained *supra*, the argument is therefore waived.

Additionally, the Labor Commission's decision to deny Appellant's claims for benefits was based on Appellant's failure to provide supporting medical evidence and the Medical Panel's determination that Appellant's alleged condition was not caused by her employment. (R. Vol. 1 at 81-82.) Thus, as discussed *supra,* because the basis of the Labor Commission's holding was the failure to provide supporting medical evidence and the Medical Panel report, any error committed regarding the prior payment of Appellant's workers' compensation benefits is not reversible.

In any event, Appellees discontinued benefits only when Appellees received a medical opinion from Dr. Knoebel that the Appellant's alleged injuries were not related to her employment. (R. Vol. 2 at 214-228.) Appellant has not cited a single authority which indicates that Appellees acted improperly by denying her claim based on the opinion of Dr. Knoebel, or that paying benefits on a claim for a time requires that such payments must continue indefinitely. In fact, Appellant cannot cite such authority, because none exists. Appellees acted appropriately and legally when they discontinued Appellant's benefits, and their decision to discontinue those benefits was eventually validated by the Medical Panel.

Appellant's argument that payment of workers' compensation benefits precludes the eventual denial of those benefits could have serious policy repercussions if it were adopted by this Court. Employers should be encouraged to begin paying workers' compensation benefits to injured workers as quickly as possible, even in disputed cases,

so that injured employees can receive the medical attention they need. However, taken to its logical conclusion, Appellant's argument would hurt the interests of injured workers in Utah. Employers would be loath to pay workers' compensation benefits in disputed cases due to the fear that paying such benefits would constitute a waiver of their ability to discontinue benefits if it eventually became apparent that such benefits were no longer owed. Therefore, adoption of Appellant's argument would encourage employers to withhold the payment of workers' compensation benefits in all but the most clear cut cases. Such a policy would have an immediately negative impact on Utah's workers. Thus, this Court should deny Appellant's Argument V for policy reasons, in addition to all other reasons set forth above.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the decision of the Labor Commission and find that the Labor Commission did not abuse its discretion in denying the Appellant's claim for workers' compensation benefits.

DATED this 4th day of February, 2011.

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Attorneys for Respondents FDIC and Pacific Employers Insurance Co.

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of February, 2011, two true and correct copies of the foregoing **BRIEF OF APPELLEE FEDERAL DEPOSIT INSURANCE COMPANY AND PACIFIC EMPLOYERS INSURANCE COMPANY** was mailed, first-class postage prepaid to:

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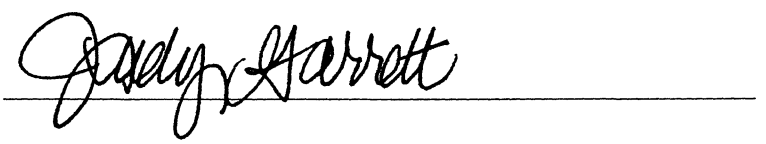

ADDENDUM

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 34A-2-601

(1) (a) The Division of Adjudication may refer the medical aspects of a case described in this Subsection (1)(a) to a medical panel appointed by an administrative law judge:

(i) upon the filing of a claim for compensation arising out of and in the course of employment for:

(A) disability by accident; or

(B) death by accident; and

(ii) if the employer or the employer's insurance carrier denies liability.

(b) An administrative law judge may appoint a medical panel upon the filing of a claim for compensation based upon disability or death due to an occupational disease.

(c) A medical panel appointed under this section shall consist of one or more physicians specializing in the treatment of the disease or condition involved in the claim.

(d) As an alternative method of obtaining an impartial medical evaluation of the medical aspects of a controverted case, the division may employ a medical director or one or more medical consultants:

(i) on a full-time or part-time basis; and

(ii) for the purpose of:

(A) evaluating medical evidence; and

(B) advising an administrative law judge with respect to the administrative law judge's ultimate fact-finding responsibility.

(e) If all parties agree to the use of a medical director or one or more medical consultants, the medical director or one or more medical consultants is allowed to function in the same manner and under the same procedures as required of a medical panel.

(2) (a) A medical panel, medical director, or medical consultant may do the following to the extent the medical panel, medical director, or medical consultant determines that it is necessary or desirable:

(i) conduct a study;

(ii) take an x-ray;

(iii) perform a test; or

(iv) if authorized by an administrative law judge, conduct a post-mortem examination.

(b) A medical panel, medical director, or medical consultant shall make:

(i) a report in writing to the administrative law judge in a form prescribed by the Division of Adjudication; and

(ii) additional findings as the administrative law judge may require.

(c) In an occupational disease case, in addition to the requirements of Subsection (2)(b), a medical panel, medical director, or medical consultant shall certify to the

administrative law judge:

(i) the extent, if any, of the disability of the claimant from performing work for remuneration or profit;

(ii) whether the sole cause of the disability or death, in the opinion of the medical panel, medical director, or medical consultant results from the occupational disease; and

(iii) (A) whether any other cause aggravated, prolonged, accelerated, or in any way contributed to the disability or death; and

(B) if another cause contributed to the disability or death, the extent in percentage to which the other cause contributed to the disability or death.

(d) (i) An administrative law judge shall promptly distribute full copies of a report submitted to the administrative law judge under this Subsection (2) by mail to:

(A) the applicant;

(B) the employer;

(C) the employer's insurance carrier; and

(D) an attorney employed by a person listed in Subsections (2)(d)(i)(A) through (C).

(ii) Within 20 days after the report described in Subsection (2)(d)(i) is deposited in the United States post office, the following may file with the administrative law judge a written objection to the report:

(A) the applicant;

(B) the employer; or

(C) the employer's insurance carrier.

(iii) If no written objection is filed within the period described in Subsection (2)(d)(ii), the report is considered admitted in evidence.

(e) (i) An administrative law judge may base the administrative law judge's finding and decision on the report of:

(A) a medical panel;

(B) the medical director; or

(C) one or more medical consultants.

(ii) Notwithstanding Subsection (2)(e)(i), an administrative law judge is not bound by a report described in Subsection (2)(e)(i) if other substantial conflicting evidence in the case supports a contrary finding.

(f) (i) If a written objection to a report is filed under Subsection (2)(d), the administrative law judge may set the case for hearing to determine the facts and issues involved.

(ii) At a hearing held pursuant to this Subsection (2)(f), any party may request the administrative law judge to have any of the following present at the hearing for examination and cross-examination:

(A) the chair of the medical panel;

(B) the medical director; or

(C) the one or more medical consultants.

(iii) For good cause shown, an administrative law judge may order the following to be present at the hearing for examination and cross-examination:

(A) a member of a medical panel, with or without the chair of the medical panel;

(B) the medical director; or

(C) a medical consultant.

(g) (i) A written report of a medical panel, medical director, or one or more medical consultants may be received as an exhibit at a hearing described in Subsection (2)(f).

(ii) Notwithstanding Subsection (2)(g)(i), a report received as an exhibit under Subsection (2)(g)(i) may not be considered as evidence in the case except as far as the report is sustained by the testimony admitted.

(h) For a claim referred under Subsection (1) to a medical panel, medical director, or medical consultant before July 1, 1997, the commission shall pay out of the Employers' Reinsurance Fund established in Section 34A-2-702:

(i) expenses of a study or report of the medical panel, medical director, or medical consultant; and

(ii) the expenses of the medical panel's, medical director's, or medical consultant's appearance before an administrative law judge.

(i) (i) For a claim referred under Subsection (1) to a medical panel, medical director, or medical consultant on or after July 1, 1997, the commission shall pay out of the Uninsured Employers' Fund established in Section 34A-2-704 the expenses of:

(A) a study or report of the medical panel, medical director, or medical consultant; and

(B) the medical panel's, medical director's, or medical consultant's appearance before an administrative law judge.

(ii) Notwithstanding Section 34A-2-704, the expenses described in Subsection (2)(i)(i) shall be paid from the Uninsured Employers' Fund whether or not the employment relationship during which the industrial accident or occupational disease occurred is localized in Utah as described in Subsection 34A-2-704(20).

Utah Administrative Code R602-2-1(F)(3)

3. Upon reasonable notice, the respondent may require the petitioner to submit to a medical examination by a physician of the respondent's choice.

Utah Administrative Code R602-2-2

Pursuant to Section 34A-2-601, the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

1. Conflicting medical opinions related to causation of the injury or disease;

2. Conflicting medical opinion of permanent physical impairment which vary more than 5% of the whole person,

3. Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;

4. Conflicting medical opinions related to a claim of permanent total disability, and/or

5. Medical expenses in controversy amounting to more than $10,000.

B. A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony showing a need to clarify the medical panel report. Where there is a proffer of new written conflicting medical evidence, the Administrative Law Judge may, in lieu of a hearing, re-submit the new evidence to the panel for consideration and clarification.

C. Any expenses of the study and report of a medical panel or medical consultant and of their appearance at a hearing, as well as any expenses for further medical examination or evaluation, as directed by the Administrative Law Judge, shall be paid from the Uninsured Employers' Fund, as directed by Section 34A-2-601.

Utah Rule of Appellate Procedure 24

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references. (a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that theappellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, theappellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person,' "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-

Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.